



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO 67 OF 2008

GITARI GITONGA.....1ST APPELLANT

B.O.G. EGOJI TEACHERS COLLEGE.....2ND APPELLANT

Versus

SAMMY WACHIRA WACHUKA.....RESPONDENT

RULING

Dismissal for want of prosecution

[1] In the application dated 20th May 2014, the Applicant/Respondent has asked this court to dismiss this appeal for want of prosecution. The major reasons for applying as disclosed in the application and the Supporting Affidavit by Paul Ngigi Advocate are:-

- (a) That it has been five years after service of the Memorandum of Appeal, yet, the Appellants have not taken any step to list the appeal for hearing;
- (2) That the Appellant have lost interest in prosecuting the appeal;
- (3) That continued pendency of this appeal is causing a lot of anxiety to the Respondent; and
- (4) That in the interest of justice, litigation should come to an end.

[2] The Appellants stated in the Replying Affidavit sworn by Kiautha Arithi Advocate that the appeal has not suffered want of prosecution because the Respondent entered into communication with the court without involving them. Counsel accused the Respondent of not causing the appeal to be admitted when he unilaterally engaged with the court. Counsel also averred that, upon perusal of the court file, this appeal had not been admitted and the reason given to him by court staff is that this appeal is not among those in the queue for admission. Therefore, counsel was of the view that as ordained in section 79B as read with Order 42 Rules 11, 13(1) and 35(1) of the Civil Procedure Rules, time had not started to run for purposes of dismissal for want of prosecution. According to him, the application before court is misconceived and should be dismissed.

DETERMINATION

Obligation of Appellant

[3] The Appellant seems to abscond from his statutory obligation in the prosecution of this appeal. He

seems to place the blame of the delay herein on the Respondent and the court. He cited section 79B of the Civil Procedure Act as read with Order 42 Rules 11, 13(1) and 35(1) of the Civil Procedure Rules to justify his stand that this appeal has not suffered want of prosecution. I will reproduce these provisions for clarity. Section 79B provides:-

79B Summary rejection of appeal Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding [section 79C](#), reject the appeal summarily

Order 42 rule 11 of the Civil Procedure Rules provides:-

Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under [section 79B](#) of the Act.

Order 42 rule 13(1) of the Civil Procedure Rules provides:-

On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers

And Order 42 rule 35(1) of the Civil Procedure Rules provides:

Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

[4] I have heard similar arguments before and I am content to cite what I stated in the case of **MERCY MUTHONI NJUE vs. AYUBMUTHURI & ANOTHER [2017] eKLR** that:-

Is this a case which should be removed from the way at all or any cost? The Memorandum of Appeal was filed on 27th February 2014. Upon filing of the Memo of appeal, within thirty days, the Appellant should, under Order 42 rule 11 of the Civil Procedure Rules, cause the matter to be listed before the judge for directions under section 79B of the Civil Procedure Act. It is not, therefore, right to state that the delay was occasioned by the Deputy Registrar in not preparing the matter for admission or otherwise under section 79B of the Civil Procedure Act. The approach that I am seeing being adopted now of shifting that obligation to the court is a complete departure from Order 42 rule 11 of the Civil Procedure Rules. Again, after service of the memorandum of appeal, the Appellant should cause the appeal to be listed for directions by the judge. That notwithstanding, I observe that the Appellant was so pre-occupied with obtaining stay of execution and much time was spend on that venture- obviously for selfish reasons- until she forgot her other equally important statutory duties which could have hastened prosecution of her appeal, thus, the delay in this matter.

[5] The Memorandum of Appeal herein was filed and served on 17th July 2008. Under Order 42 rule 11 of the Civil Procedure Rules, upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under [section 79B](#) of the Act. This is the Appellants' obligation. In this appeal, the Appellants did absolutely nothing to move this appeal forward as required under the law. It is therefore a misconception for them to blame the court and the Respondent for their failure to progress this appeal towards hearing or rejection under section 79B of the Civil Procedure Act. Accordingly, I find that there has been inordinate delay in this matter. That notwithstanding, however, I will be guided by the constitutional demand that cases should be tried on merit as opposed to summary rejection. And ask: whether despite the prolonged it is still possible to do substantive justice for the parties?

[6] To answer the foregoing question I will again borrow from **MERCY MUTHONI NJUE CASE**

(ibid)to wit:-

Nonetheless, is it still possible to do justice to the parties despite the prolonged delay? In answering this question I do not want to fall prey to the intuitive feeling that first attends to a human being that such offending appeal should be removed without much ado. I should be guided by the constitutional command that courts should always strive to do substantive justice through hearing matters on merit. Except, however, at the same time, the court must ensure that no prejudice is suffered by any party. Chesoni J (as he then was) in the case of IVUTI vs. KYUMBU (1984) KLR, 441 asked the same question I have asked at the opening of this paragraph and reiterated the principles which should always guide the court in determining application for dismissal of suit for want of prosecution: that approach has the charm of pragmatism in administration of justice. See also a work of court in the case of FREDRICK KANYIRIWERU vs. EAST AFRICAN BUILDING SOCIETY & ANOTHER [2015] eKLR that:-

I have stated before, and I will state again, the test applicable in dismissal of suit for want of prosecution is whether there has been inordinate delay which is inexcusable. However, courts of law should be careful not to gauge “inordinate delay” in its dictionary meaning but by looking at the entire circumstances of the case. Accordingly, any explanation given for the delay should be evaluated thoroughly to see whether the delay is excusable in the interest of justice. This approach inclines heavily towards sustaining rather than dismissing cases in a summary manner as that would be most cruel judicial act comparable only to the proverbial drawing of the sword of the Damocles. Thus I admire the opinion by Chesoni J (as he then was) in the case of Ivita Vs Kyumbu: whether, despite the delay, it is still possible to do justice for all the parties in the suit.

Pragmatic approach

[7] Hitherto, courts favour hearing matters on merit unless the proceeding is such that it must be removed from the judicial system in a summary manner. I will therefore adopt a more pragmatic approach as I did in the case cited above wherein I stated:-

Applying the above test, I am inclined at adopting a more pragmatic approach on the matter. The record of appeal has already been filed, and upon perusal thereof, I refuse to reject this appeal summarily. Again, I am satisfied that the record of appeal contains all the documents required under Order 42 rule 4 of the Civil Procedure Rules. Therefore, this appeal is ready for hearing. Accordingly, I direct:-

- (a) That the appeal be set down for hearing as soon as possible. I will assign the date myself so that any further delay is obviated.**
- (b) That the Appellant shall file and serve written submissions within 14 days of today. And on such service, the Respondents shall file and serve submissions within 14 days thereof.**
- (c) That, meanwhile, let the original record of the trial court be transmitted to this court forthwith. In this manner, delay is avoided and justice will be served to all parties in the appeal. Such is the novel balancing act which the court will always find itself engaged into for the sake of justice.**

The upshot

[8] In the final analysis, I will take a path which does not cause prejudice to any of the parties. The record of the trial court is in the file. Accordingly, the following orders commend themselves to the court, to wit:-

- (a) That Appellant shall, within 45 days, prepare and serve the record of appeal.**

(b) That the Appellant shall, together with the record of appeal, also file and serve written submissions. And on such service, the Respondents shall file and serve submissions within 21 days thereof.

(c) That, meanwhile, I will assign this appeal a date to confirm compliance or otherwise with the foregoing orders and to give such other directions as may be appropriate.

(d) That since the Appellants is guilty of the delay herein which would otherwise have been avoided; they shall pay thrown away costs of the application herein. It is so ordered. These orders attain a novel balance of the rights of these parties.

Dated, signed and delivered in open court at Meru this

27th day of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Mutegi advocate for Mr. Munene advocate for appellant

No appearance for respondent

F. GIKONYO

JUDGE